95-1250

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WAYNE DOLCEFINO,

Petitioner,

vs.

THE HONORABLE ELIZABETH RAY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

PETITION FOR WRIT OF CERTIORARI

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February 2, 1996

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QUESTION PRESENTED

Is a journalist, who is a defendant in a libel action brought by a public official plaintiff, protected by the First Amendment from answering deposition questions that would tend to reveal the identity of a confidential source who was inconsequential to the publication at issue, without determinations by the trial court that there is a compelling need for such testimony and that the information cannot be obtained from an alternative source less intrusive of First Amendment protections?

LIST OF PARTIES

The parties to the proceedings below are as follows:

1. Petitioner Wayne Dolcefino, a defendant in the underlying libel case.

2. Respondent The Honorable Elizabeth Ray, Judge of the 165th District Court of Harris County, Texas, presiding judge of the underlying libel case.

3. Sylvester Turner, the plaintiff in the underlying libel case.

4. Capital Cities/ABC, Inc., a defendant in the underlying libel case.*

5. CC Texas Holding Company, a defendant in the underlying libel case.*

6. KTRK Television, Inc., a defendant in the underlying libel case.

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* An interlocutory order has dismissed this defendant from the case.

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OPINIONS BELOW

The order of the Texas Supreme Court denying rehearing of Petitioner's Motion for Leave to File Petition for Writ of Mandamus dated November 9, 1995 is reprinted in the Appendix at A1.

The order of the Texas Supreme Court denying Petitioner's Motion for Leave to File Petition for Writ of Mandamus dated October 12, 1995 is reprinted in the Appendix at A2.

The judgment and opinion of the First District Court of Appeals of Texas, dated June 15, 1995, is reported at 902 S.W.2d 163 and is reprinted in the Appendix at A3. The order of the First District Court of Appeals dated August 24, 1995 denying rehearing and *en banc* consideration is reprinted in the Appendix at A4.

The orders of the trial court, the 165th District Court of Harris County, Texas, ordering Petitioner to answer deposition questions that would tend to reveal the identity of a confidential source, dated March 27, 1995 and April 18, 1995, are reprinted in the Appendix at A5.

JURISDICTIONAL GROUNDS

On November 9, 1995, the Supreme Court of Texas entered an order denying Petitioner's Motion for Rehearing of his Motion for Leave to File a Petition for Writ of Mandamus. That motion sought to overturn the trial court's orders and the Texas appellate court's opinion requiring Petitioner to answer deposition questions that would tend to reveal the identity of a confidential news source. This Petition for Writ of Certiorari is being docketed within ninety days from the entry of such order of the Supreme Court of Texas.

The Supreme Court of Texas had previously entered an order on October 12, 1995, denying Petitioner's Motion for Leave to File Petition for Writ of Mandamus. By denying

Petitioner's Motion, the Texas Supreme Court refused to overturn or even address the opinion of the First District Court of Appeals of Texas dated June 15, 1995, which denied Petitioner's Motion for Leave to File a Petition for Writ of Mandamus in that Court. The effect of the Texas Court of Appeals' opinion was to uphold two orders signed by Judge Ray in the trial court, the 165th Judicial District Court of Texas, that would require Petitioner to reveal the identity of a confidential news source.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a), which allows the Court to review by a writ of certiorari a final judgment or decree rendered by the highest court of a state in which a decision could be had where a right or privilege under the Constitution of the United States is being infringed.

The Texas Supreme Court's denial of leave to file the mandamus petition in this case is a final decree by the highest court in Texas that denies Petitioner the exercise of his constitutional rights, and therefore review by writ of certiorari is appropriate. *Pacific Coast Dairy v. Department of Agric.*, 318 U.S. 285 (1943). In addition, Petitioner's constitutional right to gather news, and the rights of all journalists to gather news, will be greatly constricted if he is forced to reveal the identity of a confidential source. Thus, the relief Petitioner is requesting is severable from the main issues in the underlying libel litigation and is too important to be denied review. *See Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43, 97 S. Ct. 2205 (1977). Petitioner cannot await a judgment by the trial court in the underlying libel case because the deprivation of his constitutional right against compelled disclosure of a confidential source is occurring well before such a judgment would ever be entered. Respondent Judge Ray perhaps recognized this fact by granting a stay of the effect of her orders until Petitioner has exhausted all of his appellate remedies, including this Petition for Writ of Certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. I: "Congress shall make no law . . . . abridging the freedom of speech or of the press . . . ."

U.S. Const. amend. XIV, § 1: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

This Petition is brought as a result of two separate orders, dated March 27, 1995 and April 18, 1995, entered by the Honorable Elizabeth Ray, the presiding judge of the 165th District Court of Harris County, Texas, that would require Dolcefino, Petitioner, to reveal, either directly or indirectly, the identity of a confidential news source even though the source was not relied upon in any way for the statements complained of by the plaintiff in the underlying libel litigation.

Dolcefino is a news reporter for television station KTRK which broadcasts over Channel 13 in Houston, Texas. On December 1, 1991, Channel 13 televised a report at 5:30 p.m. and at 10:00 p.m., written and narrated by Dolcefino, concerning an attempt to swindle money from numerous life insurance companies through the staged death and disappearance of their insured, Sylvester Clyde Foster. The beneficiaries of the insurance policies had claimed that Foster drowned after falling overboard from a sailboat off the coast of Galveston in 1986. The December 1, 1991 broadcasts revealed that the allegedly deceased Foster was, in fact, alive and in prison in Spain. KTRK reported that the story had a "potential explosive political twist."

At the time of the broadcasts, Sylvester Turner, the plaintiff in the underlying libel action, was a Texas state representative and a candidate for mayor of Houston involved in a run-off election campaign. Turner, it turned out, was the attorney who prepared Foster's will immediately prior to Foster's

staged disappearance and attempted to have the will admitted into probate.

At the time of the broadcasts, Turner was leasing a home inside the Houston city limits and sharing the premises with Dwight Thomas, who had been Foster's closest friend. It was Thomas who had introduced Turner to Foster and it was Thomas who sought to qualify himself as the Independent Executor of Foster's Estate through his counsel, Turner. In the complained of broadcasts, Channel 13 raised the question whether Turner and Thomas were aware that the alleged drowning was a hoax to swindle millions of dollars.

Turner lost the run-off election to the current Houston Mayor, Bob Lanier. On July 28, 1992, Turner filed suit against Dolcefino, KTRK Television, Inc., CC Texas Holding Company, and Capital Cities/ABC, Inc. claiming that he had been libeled by the December 1, 1991, broadcasts.

In preparing the December 1 story, Dolcefino spoke with numerous people, but promised confidentiality to only one of those people. The confidential source was not quoted in the December 1 broadcasts and was not the source for any statement contained within the December 1 broadcasts.

In his deposition in this case, Dolcefino refused to identify the confidential source, relying on a qualified journalist's privilege under the Constitution. Dolcefino did testify in detail, however, as to the nature of his conversations with his confidential source, and he has produced in discovery a document provided him by the source.

On July 14, 1994, Turner filed a Motion to Compel Dolcefino's testimony regarding an individual, Peary Perry. In his Motion to Compel, Turner alleged that Perry was Dolcefino's confidential source, referring to Perry as "the not so confidential source." Turner also alleged that Perry had worked for the campaign of Turner's opponent in the election, Lanier, and suggested that Perry had committed perjury during his deposition by not acknowledging that he was

Dolcefino's confidential source. Turner has never stated his grounds, nor has he been required to state his grounds, for believing that Perry was Dolcefino's confidential source.

Dolcefino filed a Response to Turner's Motion to Compel and invoked a qualified journalist's privilege under the First Amendment to the United States Constitution, stating that the testimony Turner was seeking would tend to reveal the identity of a confidential news source. On December 19, 1994, Respondent Judge Ray held a hearing for which Perry was summoned by the trial court. Perry testified that, although he had talked to Dolcefino several times, he did not have any specific recollection of speaking to him about the Foster matter. He further testified, however, that if he had had any conversations with Dolcefino it would have been under a condition of confidentiality and he would have requested to remain anonymous.

> Q (by Turner's counsel): So as we sit here today, Mr. Perry, there is no reason in your mind that would cause you to believe that you requested that Mr. Dolcefino retain your confidentiality at some time before December 1, 1991, about the Foster matter; is that correct?
>
> A: Yes, sir, I believe I would.
>
> Q: You believe you would what?
>
> A: If I had ever had any meeting at all with Mr. Dolcefino it was under a condition of confidentiality and I requested to remain anonymous with any information.
>
> What I am saying is I don't recall giving him any information regarding this matter. I'm not clear as to what dates I ever met with him prior to December 1.
>
> Under questioning by the court, Perry testified as follows:

Q (by the Court): So the only thing we are talking about is the issue of your confidentiality, potential confidentiality, in regards to the Sylvester Foster matter and what I hear you telling me is you don't recall talking to him about that, if you did you would have asked for confidentiality, but you don't remember talking to him; is that a correct analysis of it?

A: I think if I had a meeting with him on some other matter and this matter were to come up or had come up, I would have considered it held in confidence, yes ma'am.

Q: Sure, but you don't remember that ever happening?

A: I don't recall the specifics of that happening, no, ma'am, but I don't recall the specifics of anything that we've talked about.

Q: So what you are saying is everything that you ever say to Wayne Dolcefino you expect to be held confidential?

A: Absolutely.

Perry did not confirm at the hearing, and has never confirmed, Turner's speculation that he was Dolcefino's confidential source. Neither Dolcefino nor any other witness in this lawsuit has testified as to the identity of the confidential source to whom Dolcefino spoke.

On March 27, 1995, Judge Ray signed an order, conditionally granting Turner's Motion to Compel, which required Dolcefino to appear in court and answer certain questions attached to the order. Dolcefino refused to answer seven of the questions attached to the order because his testimony would tend to reveal the identity of his confidential news source. The court then convened an *in camera* proceeding and, after taking Dolcefino's testimony, sustained his claim of

a journalist's privilege with respect to two questions but overruled his claim of privilege with respect to the other five. Judge Ray has stayed the effect of her ruling until Dolcefino has exhausted all appellate review of her decision, including this Petition for Writ of Certiorari.

The five questions Dolcefino has been ordered to answer, despite his claim of a journalist's privilege, are as follows:

1. With respect to each contact or communication, if any, that you have had with Perry state:

   (a) the date, time, place and method of the contact or communication,

   (b) who initiated the contact or communication,

   (c) the length of time of the contact or communication, and

   (d) the specific subject matter of the contact or communication.

2. At any time before 10:00 p.m., December 1, 1991, Did Peary Perry impart to you any information relating in whole, or in part, to the "Foster matter?"

   If so, what specific information and when did he impart it to you?

3. At any time before 10:00 p.m., December 1, 1991, did Peary Perry provide you with any documents or written material of any nature relating in whole, or in part, to the "Foster matter?"

   If so, describe the specific documents, explain when he provided them to you, and describe specifically what information they contained.

4. At any time before 10:00 p.m., December 1, 1991, to your knowledge or belief, did Peary Perry

deliver or cause to be delivered to you or Channel 13 any documents from the Foster probate files? If so, specifically describe the documents.

5. At any time before 10:00 p.m., December 1, 1991, did Peary Perry advise you that he was attempting to obtain certain probate documents from the "Foster matter?"

   If so, did Perry advise you who or what persons were obtaining the selected probate documents?

See Appendix at A5.

Answering these questions will either directly or indirectly reveal the identity of Dolcefino's source. Dolcefino has already testified as to what information was provided to him by a confidential source. If Perry is the confidential source, then Dolcefino's answers to the five questions will match the answers he has already given regarding conversations with his confidential source and the document the source gave him. In that event, the source will be revealed. If Dolcefino answers that Perry gave him no information about the Foster matter, then Turner will have eliminated his prime suspect from his list of possible confidential sources and thereby indirectly obtain information about the identity of the source.

HOW THE FEDERAL QUESTION WAS RAISED

At the time Turner's counsel questioned Dolcefino in his deposition regarding the identity of his confidential source, Dolcefino invoked a journalist's privilege, grounded in the First Amendment to the United States Constitution, against disclosure of the source's identity. In his written response to Turner's Motion to Compel Dolcefino to Testify Regarding Peary Perry, Dolcefino again invoked a journalist's privilege under the First Amendment to the United States Constitution against revealing the identity of his confidential source, particularly a source that was not used as the basis for any statement

in the broadcast at issue. Excerpts from Dolcefino's Response to Turner's Motion to Compel are reprinted in the Appendix at A6. After Judge Ray ordered Dolcefino to answer the five questions concerning Peary Perry referenced above, Dolcefino again refused, invoking a privilege under the First Amendment to the United States Constitution.

On April 26, 1995, Dolcefino filed a Motion for Leave to File a Petition for Writ of Mandamus in the Texas Court of Appeals (1st District). In a published opinion dated June 15, 1995, the Texas Court of Appeals denied such leave and questioned the existence of a journalist's privilege under the First Amendment to the United States Constitution. *Dolcefino V. Ray,* 902 S.W.2d 163 (Tex. App. — Houston [1st Dist.] 1995, no writ). The Texas Court of Appeals' opinion specifically references that Dolcefino claimed a journalist's privilege under the First Amendment to the United States Constitution. On June 30, 1995, Dolcefino filed a Motion for Rehearing of his Motion for Leave to File Petition for Writ of Mandamus and Suggestion of *En Banc* Reconsideration. That Motion for Rehearing was denied on August 3, 1995 and by an Amended Order dated August 24, 1995 the Texas Court of Appeals denied *en banc* reconsideration.

On September 1, 1995, Dolcefino filed a Motion for Leave to File Petition for Writ of Mandamus in the Supreme Court of Texas. By Order dated October 12, 1995, the Supreme Court of Texas denied such leave and by Order dated November 9, 1995, denied rehearing of Dolcefino's Motion. The opinion of the Texas Court of Appeals and the orders of the trial court are not subject to further review by any Texas court.

REASONS FOR GRANTING THE WRIT

The state courts of Texas have created a major and recurring conflict between First Amendment newsgathering protections, if any, in Texas state courts and the protections that have been recognized and applied by federal courts in Texas, by all federal courts of appeals, and by this Court. The resolution of that conflict is critical to the continued vitality of First Amendment protection of the newsgathering activities of the press, particularly with regard to public officials. Additionally, the inconsistent interpretation of a journalist's rights between the highest Texas state courts and federal courts in Texas has resulted in journalists attempting in vain to have contempt orders overturned in the state court system before finally receiving a recognition of their First Amendment rights by writ of habeas corpus in the federal court system.

The Texas court decisions, if allowed to stand, would have a drastic effect on the newsgathering process, a process that is protected by the First Amendment to the United States Constitution. There is a substantial federal question as to whether a state court can undermine vital constitutional protections by compelling a journalist to answer deposition questions in a public official libel case that would tend to reveal the identity of a confidential source when that source was not used as the basis for any statement in the complained of broadcast and therefore the information sought could not be highly relevant to the libel case. Furthermore, the orders of the trial court and the opinion of the Texas Court of Appeals allow a public official libel plaintiff to obtain the name of a confidential source without showing any compelling need for the identity of the source and without showing that the identity of the source could be obtained by means less intrusive of First Amendment protections.

In this case, the public official plaintiff is being allowed to compel a reporter to answer questions that would tend to reveal the identity of a confidential source simply based on his

own speculation as to the identity of the source. The Texas courts neither identified a need for the testimony sought nor did they attempt to balance any asserted need with the effect compelled disclosure of a confidential source would have on the exercise of First Amendment rights. The orders of the trial court and the opinion of the Texas Court of Appeals conflict with the protection of the newsgathering process, and specifically the protection of the identity of confidential sources used in the newsgathering process, recognized by the majority of federal courts of appeals including the United States Court of Appeals for the Fifth Circuit, and by sister states.

A. THE TEXAS DECISIONS ON THE FEDERAL QUESTION PRESENTED CONFLICT WITH THE CONSTITUTIONAL NEWSGATHERING PROTECTIONS UPHELD BY THE OVERWHELMING MAJORITY OF FEDERAL COURTS OF APPEALS

In *Branzburg v. Hayes*, 408 U.S. 655 (1972), "nine justices agreed that reporters are entitled to some measure of qualified First Amendment protection . . . " for unpublished information. *Lenhart v. Thomas,* ___ F. Supp. ___ No. H-96-0072, slip op. at 8 (S.D. Tex. January 23, 1996). The protection of the newsgathering process in Texas is being seriously eroded as Texas courts interpret and apply *Branzburg* and the protections it recognized in a way that is in conflict with the decisions of federal courts of appeals and even with federal courts in the same jurisdiction. In addition, the fact that the *Branzburg* opinion was limited to whether journalists had to respond to grand jury subpoenas has created ambiguity as to the strength of First Amendment protections of the newsgathering process when confidential information is being sought in a civil libel case involving a public official. For each of those reasons, a review by this Court is warranted.

In the published opinion of the Texas Court of Appeals, the court refused to acknowledge the constitutional privilege

for the newsgathering process that has been found by the overwhelming majority of federal courts of appeals, including the Fifth Circuit in *Miller v. TransAmerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980), *modified*, 628 F.2d 932 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981), and *In re Selcraig*, 705 F.2d 789 (5th Cir. 1983). In *Miller*, a public figure libel case, the Fifth Circuit recognized a qualified journalist's privilege under the First Amendment and utilized a three-part balancing test that had been adopted by other federal courts of appeals in applying that privilege.[1] The three-part test involves an analysis of whether 1) the information sought is relevant; 2) whether the information can be obtained by alternative means; and 3) whether there is a compelling need for the information. 621 F.2d at 726. On rehearing, the Fifth Circuit in *Miller* clarified the first requirement, holding that a libel plaintiff must show that a statement attributable to the source was actually published and is both factually untrue and defamatory. 628 F.2d at 932.

The Fifth Circuit's analysis of the existence of a qualified journalist's privilege under the First Amendment in *In re Selcraig* and *Miller v. TransAmerican Press,* and the application of a three-part test to overcome that privilege, is consistent with the view of the overwhelming majority, if not all,[2] of the other federal courts of appeals. *See, e.g., United States v. Burke,* 700 F.2d 70 (2d Cir. 1983), *cert. denied,* 464 U.S. 816 (1983):

> The law in this Circuit is clear that to protect the important interests of reporters and the public in preserving the confidentiality of journalist's sources, disclosure may be ordered only upon a clear and

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[1] The Fifth Circuit attributed the origin of the test to *Garland v. Torre,* 259 F.2d 545 (2d Cir.), *cert. denied,* 358 U.S. 910 (1958).

[2] The one possible exception is the Sixth Circuit. The balancing test advocated by the Sixth Circuit is discussed on pages 14-15 of this Petition.

> specific showing that the information is: highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources.

700 F.2d at 76-77 (citations omitted). *See also Bruno & Stillman v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980); *Baker v. F&F Inves.*, 470 F.2d 778, 783-85 (2d Cir. 1972), *cert. denied*, 411 U.S. 966, (1973); *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); *Riley v. Chester*, 612 F.2d 708, 715 (3d Cir. 1979) ("the strong public policy which supports the unfettered communication to the public of information, comment and opinion and the Constitutional dimension of that policy, expressly recognized in *Branzburg v. Hayes*, lead us to conclude that journalists have a federal common law privilege, albeit qualified, to refuse to divulge their sources."); *LaRouche v. National Broadcasting Co.*, 780 F.2d 1134, 1139 (4th Cir.), *cert. denied*, 479 U.S. 818, (1986); *Church of Scientology Int'l v. Daniels*, 992 F.2d 1329, 1335 (4th Cir. 1993); *Cervantes v. Time*, 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125, (1973) (finding that the identity of a confidential source in a libel case was inconsequential and therefore there was no compelling reason to allow the plaintiff to conduct discovery regarding the source); *United States v. Calvert*, 523 F.2d 895, 902 n.4 (8th Cir. 1975), *cert. denied*, 424 U.S. 911 (1976) (quashing criminal defendant's subpoena because of inadequate showing of need); *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993); *Bursey v. United States*, 466 F.2d 1059 (9th Cir.), *reh'g denied*, 466 F.2d 1092 (1972); *Farr v. Pitchess*, 522 F.2d 464, 468 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436-37 (10th Cir. 1977); *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986), *cert denied*, 483 U.S. 1021 (1987); *Zerilli v. Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981) (noting that "a qualified reporter's privilege under the First Amendment should be readily available in civil cases."); *Clyburn v. News World Communications*, 903 F.2d 29 (D.C. Cir. 1990) (plaintiff in libel case failed to exhaust alternative

sources of information and therefore could not overcome privilege).

The above authorities establish that journalists should be and are entitled to a qualified privilege, grounded in the First Amendment, against revealing their newsgathering processes. The importance of confidential sources to that newsgathering process has also been expressly recognized. *See, e.g., Riley v. Chester,* 612 F.2d at 714; *Cervantes v. Time,* 464 F.2d at 994.

The qualified journalist's privilege under the First Amendment has been applied by the federal courts of appeals in both the civil and criminal contexts. The ten of twelve federal circuits that have recognized the privilege have often relied, at least in part, upon this Court's opinion in *Branzburg v. Hayes.* The opinion in *Branzburg* involved a journalist being subpoenaed by a federal grand jury to testify about criminal conduct that he had observed, and the holding of the plurality in *Branzburg* was expressly limited to whether reporters would have to respond to grand jury subpoenas. In that context, the First Amendment rights of the journalist may compete with the public's interest in the investigation of crime. Justice Powell's concurring opinion in *Branzburg,* which is critical to understanding the *Branzburg* holding, found that even in the context of a criminal proceeding a balancing test should be applied.

The two federal courts of appeals that have not expressly adopted or applied a First Amendment based three-part balancing test have nevertheless recognized First Amendment protection of the journalist's newsgathering process in a manner that conflicts with the Texas courts' interpretation. In *In re Grand Jury Proceedings,* 810 F.2d 580 (6th Cir. 1987), the Sixth Circuit affirmed a denial of a writ of habeas corpus to a television reporter who had been subpoenaed by a county grand jury. The court relied upon *Branzburg v. Hayes* in holding that the reporter did not have a First Amendment privilege against responding to a grand jury subpoena. However, the Sixth Circuit did state that courts should

> follow the admonition of the majority in *Branzburg* to make certain that the proper balance is struck between freedom of the press and the obligation of all citizens to give relevant testimony, by determining whether the reporter is being harassed in order to disrupt his relationship with confidential news sources, whether the grand jury's investigation is being conducted in good faith, whether the information sought bears more than a remote and tenuous relationship to the subject of the investigation, and whether a legitimate law enforcement need will be served by forced disclosure of the confidential source relationship.

810 F.2d at 586.[3] In *Desai v. Hirsch,* 954 F.2d 1408 (7th Cir. 1992), the Seventh Circuit acknowledged that a qualified journalist's privilege had been found under the United States Constitution but based its opinion on the Illinois Reporter's Privilege Statute and on procedural grounds.

Dolcefino in this Petition is advocating only that a journalist reporting on the activities of public officials is entitled to constitutional protection of his newsgathering activities in a civil libel case and particularly is entitled to constitutional protection of the identity of confidential sources unless a public official libel plaintiff can make the showing required by all

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[3] As the First Circuit observed in *Bruno & Stillman v. Globe Newspaper Co.,* 633 F.2d at 595-96, the analysis of whether there is a qualified journalist's "privilege" under the First Amendment or whether the First Amendment requires simply a balancing test of societal interests is largely one of semantics. The difference between the Sixth Circuit's approach and the approach of the other federal circuits is indeed one of semantics. Even without recognizing a qualified "privilege" as such, the Sixth Circuit nevertheless advocated a balancing test that would balance the potential harm to the free flow of information against an asserted need for testimony sought from the reporter. The Texas courts, however, engaged in no such balancing test and in fact were not able to identify any need, asserted or otherwise, for the testimony sought. Thus, the Texas courts' approach conflicts with the Sixth Circuit's analysis as well.

federal courts of appeals. As the D.C. Circuit found in *Zerilli v. Smith:*

> [I]n the ordinary case, the civil litigant's interest in disclosure should yield to the journalist's privilege. Indeed, if the privilege does not prevail in all but the most exceptional cases, its value will be substantially diminished. Unless potential sources are confident that compelled disclosure is unlikely, they will be reluctant to disclose any confidential information to reporters.

656 F.2d at 712. While a plaintiff in a public official libel case has a substantial burden in having to prove actual malice[4] and therefore might argue that he has a compelling need to delve into the reporter's newsgathering process, a libel case in which the actual malice standard must be satisfied is generally brought by a public figure or public official whose activities involve matters of public concern. Therefore, as the Fifth Circuit also recognized in *Miller v. TransAmerican Press*, the public has a substantial interest in the journalist's ability to report about public officials, public figures and matters of public concern that should not be impaired by compelled disclosure of the newsgathering process except in the most exceptional cases. 621 F.2d at 725-26.

Federal courts in Texas have followed the Fifth Circuit's requirement that a plaintiff seeking to overcome the qualified journalist's privilege must satisfy the three-part test utilized in *Miller v. TransAmerican Press. See Mize v. McGraw-Hill, Inc.*, 82 F.R.D. 475 (S.D. Tex. 1979), *on reh'g*, 86 F.R.D. 1 (1980); *Campbell v. Klevenhagen*, 760 F. Supp. 1206 (S.D. Tex. 1991). In *Mize v. McGraw-Hill*, the court stated that "the ready disclosure of confidential sources would have a chilling, perhaps freezing effect on the free flow of truthful information. . . . Ultimately, publication of publicly useful and constitutionally

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[4] *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

protected information, i.e., truthful statements about public figures or falsehoods published without actual malice, would be inhibited by compelled disclosure of confidential sources." 86 F.R.D. at 3.

Dolcefino's situation presents one of the most compelling circumstances for recognition of First Amendment protection for a journalist's newsgathering activities and strict application of the balancing test necessary to overcome that protection, which neither the trial court nor the Texas Court of Appeals applied at all. Dolcefino's claims to First Amendment protection would not have the effect of preventing him from testifying in a criminal matter, but rather would protect his ability and the ability of all journalists to use confidential sources in gathering news about public officials. The fact that this is a civil action in which a journalist has unquestionably acted in his journalistic capacity, and not as a witness to criminal activity, and in particular a civil action brought by a public official, at least compels proper application of a balancing test that has been recognized by *all* federal courts of appeals. The right to gather news about a public official running for even higher public office, as well as discourse on the activity of that public official, are at the core of First Amendment protections and the balance should be heavily weighted in favor of the journalist in such a situation.

As a result of the trial court's orders, and the Texas Court of Appeals' upholding of those orders and questioning of the existence of a constitutional qualified privilege, there is not only conflicting jurisprudence between Texas state courts and federal courts of appeals on this vital federal question, but there is also conflicting jurisprudence between Texas state courts and federal courts in Texas. The Texas courts' decisions have exacerbated a situation created by two decisions of the highest Texas criminal court. In *Ex parte Grothe*, 687 S.W.2d 736, 738 (Tex. Crim. App.), *cert. denied*, 474 U.S. 944 (1984), the Texas Court of Criminal Appeals held that *Branzburg* "quite clearly found that no balancing was required" in a case

where a journalist was subpoenaed to disclose photographs which potentially showed criminal activity. The Court further stated that cases from other jurisdictions urging that a balancing test be adopted primarily involved disclosure in civil actions and were "not controlling." *Id.* at 739. In *State ex rel Healy v. McMeans*, 884 S.W.2d 772 (Tex. Crim. App. 1994), the court was persuaded by the absence of any statutory newsman's privilege in Texas and the absence of any evidentiary privilege in the Texas Rules of Criminal Evidence relating to newsmen. The *McMeans* court again stated that no balancing of interests was required and viewed the trial court's responsibility to vacate orders granting a motion to quash subpoenas served upon the newsman as a "ministerial duty" that required no discretion. *Id.* at 775.

The consequence of this major conflict between a journalist's protections in state court and in federal court in Texas was demonstrated in the case of *Campbell v. Klevenhagen*, 760 F. Supp. 1206. In *Campbell*, two reporters were subpoenaed by defense counsel in a murder trial and were held in contempt by a Texas state court for not revealing the identity of their confidential sources whom they interviewed a day after the murders. The reporters appealed to the Texas Court of Criminal Appeals which refused to hear their application for relief from the order of contempt. Subsequently, the reporters filed a writ of habeas corpus in the United States District Court for the Southern District of Texas. The federal court granted the writ of habeas corpus, finding that the criminal defendant had not met the three-part test to overcome the qualified reporter's privilege. 760 F. Supp. at 1215-16.

More recently in *Lenhart v. Thomas*, ___ F. Supp. ___ (S.D. Tex. January 23, 1996), a reporter for the Houston Chronicle, Lenhart, went through the Texas state court system in an attempt to prevent compelled disclosure of confidential sources referenced in a story involving a grand jury indictment in a murder case. After being held in contempt by the state criminal court and being denied relief by the Texas Court of

Criminal Appeals, Lenhart, like the reporter in *Campbell*, filed a writ of habeas corpus in the federal court for the same jurisdiction. The Southern District of Texas, again stating that it was bound by federal court precedent, upheld Lenhart's claim to a qualified journalist's privilege and applied a balancing test to find that the party seeking compelled disclosure of the names of the confidential sources had not exhausted all alternative sources of information. Accordingly, the federal court granted a writ of habeas corpus.

These diametrically opposed interpretations and application of *Branzburg* and its progeny by state courts in Texas and federal courts require resolution by this Court. The present state of Texas law wastes time and resources. A reporter who is subpoenaed to reveal confidential information must debate the issue in state court, the state will refuse even to apply a balancing of the competing societal interests, and then, the reporter will eventually be freed from any order of contempt upon a writ of habeas corpus to a federal court in Texas.

It is of particular concern in Dolcefino's situation that no proper balancing test was applied because there is not even an identifiable need for the confidential information and the Texas courts have allowed a public official libel plaintiff to compel disclosure of a confidential source simply by speculating as to the name of that source. Clearly, if the balancing test of *Miller v. TransAmerican Press* had been applied, Dolcefino would have prevailed.

The first part of that balancing test requires that a party seeking compelled disclosure of a confidential source's identity demonstrate by "substantial evidence" that the statement attributed to the confidential source was published and was false and defamatory. *Miller v. TransAmerican Press,* 621 F.2d at 726 (citation omitted). This sometimes has been characterized as a showing that the testimony must be "highly relevant." *United States v. Burke,* 700 F.2d at 76-77. The trial court made no such finding. Indeed, although Dolcefino testified

that he met with a confidential source, he further testified that the confidential source did not serve as the basis for any statement in the broadcast, let alone a statement at issue which plaintiff contends is false and defamatory. Where a confidential source is inconsequential to the complained of language and in fact to the complained of broadcast as a whole, it is virtually inconceivable that the libel plaintiff seeking disclosure would be able to overcome the journalist's privilege. *Cervantes v. Time,* 464 F.2d at 994 (holding that disclosure should not be compelled unless there is a "concrete demonstration" that revealing the identity would lead to persuasive evidence of actual malice). *See Dowd v. Calabrese,* 577 F. Supp. 238, 241-42 (D.D.C. 1983) (confidential source not relied upon in article is "far from the heart of plaintiff's claim"). *Liberty Lobby, Inc. v. Rees,* 111 F.R.D. 19, 21-22 (D.D.C. 1986), *aff'd,* 852 F.2d 595 (D.C. Cir. 1988) (source was involved in "but one of numerous statements at issue" and is therefore not essential to plaintiff's case). The decisions of the Texas courts allowing a public figure libel plaintiff to compel the disclosure of the identity of a confidential source who was not relied upon for *any* statement in the complained of broadcast would effectively compel disclosure in every case. The chilling effect that this interpretation of the First Amendment would have on potential sources discussing the activities of public officials with journalists would be enormous.

The second part of the test used by federal courts of appeals in journalist's privilege cases requires a determination that the confidential source's identity is necessary or critical to maintenance of the plaintiff's claim. Where a public official plaintiff in a libel case seeks the identity of a confidential source that was not used as the basis for any statement complained of in his libel action, and in fact was not used as the basis for *any* statement in the broadcast, allegedly libelous or otherwise, it is hard to imagine how this prong of the test can be met. Judge Ray made no determination that this part of the

test was met, nor did the Texas Court of Appeals.[5] Apparently, the point that plaintiff is trying to make is that if the confidential source is in some way affiliated with the campaign of his opponent in the mayoral race, current Houston Mayor Lanier, then the source is necessarily less credible. However, when that source has not served as the basis for any statement in the broadcast, such an argument is not available to Turner and therefore there is no need for the testimony Turner seeks.

The third and final prong of the test to overcome the qualified journalist's privilege involves a showing that reasonable efforts have been made to learn the informant's identity by alternative means but that no other reasonable means is available. Under Judge Ray's ruling, this part of the test is rendered meaningless. By the Texas courts' reasoning, if a party is able to learn the informant's identity by alternative means, he is then entitled to compel confirmation of that identity from the journalist. Judge Ray never required Turner to state why he believes that Perry is Dolcefino's confidential source and why the means that led him to Perry are insufficient to confirm that Perry is the confidential source. Additionally, Turner has not sought to depose other persons whom he suspects of being the confidential source or others who may be able to testify as to whether Perry is the confidential source or not. As the court held in *Carey v. Hume* 492 F.2d 631, 638 (D.C. Cir. 1974), compelled disclosure should be "normally the end, and not the beginning, of the inquiry."

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[5] In *Miller v. TransAmerican Press,* the Fifth Circuit identified one of the impure motives that could lead a public figure plaintiff to try to determine the identity of a confidential source, that being to retaliate against the source. 621 F.2d at 725. In this case, State Representative Turner has alleged from the night of the broadcast forward that the Foster story was "hand-delivered" to Dolcefino by the campaign of his opponent in the Houston mayoral election, Bob Lanier. Turner in his Motion to Compel went so far as to suggest that Perry was committing perjury. However, Turner's apparent desire for political retribution in no way compels Dolcefino to testify as to the matters requested by Turner.

Interestingly, and perhaps uniquely in a case where a party is seeking compelled confirmation of the identity of a confidential source, Turner has brazenly referred to Perry as the "not so confidential source." The Texas Court of Appeals accepted Turner's speculation, holding that Perry's "identity was discovered by Mr. Turner's own means, without any judicial compulsion," and concluding that Dolcefino therefore would be required to testify. *See* Appendix at A3. This reasoning, however, is exactly the opposite analysis that the alternative means requirement mandates. The requirement as applied by the federal courts of appeals holds that only if the alternative means are *unsuccessful* will a party seeking to compel disclosure be able to overcome the journalist's privilege. *See, e.g., Larouche v. National Broadcasting Co.,* 780 F.2d at 1139 (court denied libel plaintiff's motion to compel identity of a confidential source where libel plaintiff claimed to know identity of NBC's principal sources). Since Turner claims to have identified the confidential source, Turner's alternative means, whatever they may be, have allegedly been successful and then there can be no legitimate reason to compel Dolcefino to testify further on this issue.[6]

This is not a case where the confidential source has relinquished anonymity and the party seeking disclosure is attempting to learn the nature of the information exchanged between the confidential source and the journalist. Rather, Turner knows the information that was obtained by the journalist from his confidential source, knows that the information did not serve as the basis for any statement in the complained of broadcast, but nevertheless is still attempting to learn the confidential source's identity. Dolcefino, in order to protect the integrity of the newsgathering process, seeks to maintain confidentiality with regard to the source's identity.

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[6] In discussing the Texas decisions and putting forth the arguments contained in this Petition, Dolcefino is in no way endorsing Turner's speculation that Perry is the confidential source.

The three-part test, as applied by the federal courts of appeals, is meant to be a rigorous one and the constitutional safeguards against compelled disclosure of a confidential source in a civil case in the state courts of Texas should be subject to the same stringent standard. The constitutional safeguards are no less applicable if Perry is *not* the confidential source. A public official libel plaintiff cannot compel disclosure of the identity of a confidential source by engaging the defendant-journalist in a process of elimination. Every name the journalist eliminates in that process as a possible source tends to reveal the identity of the confidential source. For instance, in *Zerilli v. Smith,* 656 F.2d 705, 714 (D.C. Cir. 1981), the court determined that the party seeking to learn the identity of a confidential source might have to take sixty depositions rather than force the reporter to reveal the identity or testify as to which of those sixty potential deponents was not his source. *See also McGraw-Hill, Inc. v. Arizona,* 680 F.2d 5, 8 (2d Cir.), *cert. denied,* 459 U.S. 909 (1982); *Carey v. Hume,* 482 F.2d at 639. Allowing a libel plaintiff to conduct discovery as to who is *not* the source would render meaningless the journalist's privilege or any balancing test related thereto.

The Texas decisions seem to be based on the presumption that the person whose rights are determinative in the analysis is the confidential source himself. Both the trial court and the Texas Court of Appeals concluded that Perry had "no confidentiality left to protect" since Turner had supposedly discovery Perry's identity by his own means. *See* Appendix at A3. This analysis is wholly without support and sets a dangerous precedent. The basis for a qualified journalist's privilege is not to protect the interests of the confidential source. Rather, the journalist's privilege exists in order to protect a journalist's newsgathering activity for the benefit of the public at large. *See U.S. v. Cuthbertson*, 630 F.2d at 147. It is the public's knowledge of news about their elected officials that would suffer if the journalist's privilege were not recognized and the test for overcoming that privilege were not strictly applied in a case such as this.

In discussing whether a reporter can be compelled to testify about his newsgathering activities, *all* federal courts of appeals, including the Sixth Circuit, and this Court have advocated a balancing of the right to a free press with other vital public interests, such as the investigation of crime or a competing Sixth Amendment right to a fair trial. The holding of this Court in *Branzburg v. Hayes* that the newsgathering process is entitled to constitutional protection at the very least compels such a balancing. *Accord, In re Grand Jury Proceeding*, 810 F.2d at 586. Most of the federal courts of appeals have accomplished that balancing by utilizing the three-part test used in *Garland v. Torre* and *Miller v. TransAmerican Press*. Nowhere, however, in any of the federal court jurisprudence is there the suggestion that the balance to be struck is between the rights of a journalist who seeks to invoke a journalist's privilege and the rights of an alleged confidential source. The focus of the Texas courts on the rights of the alleged confidential source was therefore misplaced and in direct conflict with the focus of all federal courts of appeals and of this Court on the rights of the public at large.

In *Riley v. Chester*, the Third Circuit discussed the vital role that confidential sources play in the newsgathering process:

> The interrelationship between newsgathering, news dissemination and the need for a journalist to protect his or her source is too apparent to require belaboring. A journalist's inability to protect the confidentiality of sources s/he must use will jeopardize the journalist's ability to obtain information on a confidential basis. This in turn will seriously erode the essential role played by the press in the dissemination of information in matters of interest and concern to the public.

612 F.2d at 714 (citations omitted). *See also Zerilli v. Smith*, 656 F.2d at 712. The Ninth Circuit has also emphasized that the journalist's privilege is for the benefit of the public at large. "[T]he [journalist's] privilege is a recognition that society's interest in protecting the integrity of the newsgathering process, and in insuring the free flow of information to the public, is an interest of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice. *Schoen v. Schoen*, 5 F.3d 1289, 1292 (9th Cir. 1993) (quoting *Herbert v. Lando*, 441 U.S. 153, 183 (1979)). This Court itself has stated that a free press is "not for the benefit of the press so much as for the benefit of all of us." *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967). "Enlightened choice by an informed citizenry is the basic ideal upon which an open society is premised, and a free press is thus indispensable to a free society." *Branzburg v. Hayes*, 408 U.S. at 726 (Stewart, J. dissenting) (footnote omitted).

Thus, Dolcefino's rights and the public's interest in news regarding the activities of candidates for high political office should not be determined by what rights a particular confidential source may have. Moreover, Dolcefino should have the same First Amendment rights in Texas state courts that he has in federal courts. That conflict can only be resolved by this court granting a writ of certiorari.

B. THE TEXAS DECISIONS ON THE FEDERAL QUESTION PRESENTED CONFLICT WITH THE RECOGNITION AND APPLICATION OF A BALANCING TEST TO PROTECT JOURNALISTS' NEWSGATHERING RIGHTS IN SISTER STATES

Since this Court's recognition in *Branzburg v. Hayes* that the newsgathering process was entitled to constitutional protection, the vast majority of the highest state courts throughout the country that have addressed the issue in reported opinions, relying at least in part on the United States Constitution, have either recognized the existence of a qualified

journalist's privilege or at least have applied a balancing test similar to that adopted by the federal courts of appeals.[7] *See, e.g., Mitchell v. Superior Court*, 690 P.2d 625, 632 (Cal. 1984); *Tribune Co. v. Huffstetler*, 489 S.2d 722, 723 (Fla. 1986); *Matter of Contempt of Wright*, 700 P.2d 40, 41 (Idaho 1985); *Winegard v. Oxberger*, 258 N.W.2d 847, 850-52 (Iowa 1977), *cert. denied*, 436 U.S. 905 (1978); *Kansas v. Sandstrom*, 581 P.2d 812, 814-15 (Kan. 1978), *cert. denied*, 400 U.S. 929 (1979); *In re Ridenhour*, 520 So. 2d 372, 375-76 (La. 1988); *In re Letellier*, 578 A.2d 722, 726 (Maine 1990) (advocating balancing test without finding privilege); *Sinnott v. Boston Retirement Board*, 524 N.E.2d 100, 104 (Mass.), *cert. denied*, 488 U.S. 980 (1988)(common law based balancing test); *New Hampshire v. Siel*, 444 A.2d 499, 502-03 (N.H. 1982); *O'Neill v. Oakgrove Constr., Inc.*, 523 N.E.2d 277, 278-80 (N.Y. 1988); *Taylor v. Miskovsky*, 640 P.2d 959, 960-62 (Okla. 1981); *Hopewell v. Midcontinent Broadcasting*, 538 N.W.2d 780 (S.D. 1995); *Vermont v. St. Peter*, 315 A.2d 254, 256 (Vt. 1974); *Brown v. Commonwealth*, 204 S.E.2d 429, 431 (Va.), *cert. denied*, 419 U.S. 966 (1974); *Senear v. The Daily Journal American*, 97 Wash. 2d 148, 641 P.2d 1180 (1982) (Washington Supreme Court found common law basis to adopt the three-part balancing test used by federal courts of appeals); *Hudok v. Henry*, 389

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[7] Not included in these citations are cases in which state supreme courts upheld a reporter's privilege based solely on their state shield laws, *see, e.g., Saxton v. Arkansas Gazette Co.*, 569 S.W.2d 115 (Ark. 1978); *In re Special Grand Jury Investigations*, 72 N.E.2d 450 (Ill. 1984).

S.E.2d 188, 192-93 (W. Va. 1989); *Zelenka v. Wisconsin*, 266 N.W.2d 279, 287 (Wis. 1978).[8]

Four state supreme courts considering the issue since *Branzburg* have rejected a reporter's privilege grounded in the First Amendment to the United States Constitution. *Pankratz v. District Court*, 609 P.2d 1101 (Colo. 1980); *Vaughn v. State*, 381 S.E.2d 30, 31 (Ga. 1989) (Georgia Supreme Court refused to recognize qualified journalist's privilege in a criminal case); *National Broadcasting Company, Inc. v. Court of Common Pleas*, 556 N.E. 2d 1120 (Ohio 1990); *Capuano v. Outlet Co.*, 579 A.2d 469 (R.I. 1990) (Rhode Island supreme court found reporter's privilege under state shield law but rejected constitutionally based privilege). However, since the *Pankratz* case and the *Vaughn* case, both the Colorado and Georgia state legislatures have enacted shield laws. Ohio and Rhode Island already had shield laws in place that require a balancing of interests and that were applied by their state supreme courts in *NBC, Inc.* and *Capuano*, respectively.

To date, thirty states, including the District of Columbia, have adopted "shield laws" providing reporters with either an absolute or qualified privilege against compelled disclosure, including some states where courts to date have not concluded

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[8] The Wisconsin Supreme Court addressed the issue again in *State ex rel. Green Bay Newspaper Co. v. Circuit Court*, 335 N.W.2d 367 (Wis. 1983). In that case, the court found a journalist's privilege under the Wisconsin constitution but also stated that the journalist's privilege was "related to the First Amendment." *Id.* at 373 quoting *Brown v. Commonwealth*. The Wisconsin Supreme Court then applied the three-part balancing test. *Green Bay Newspaper Company* underscores the fact that while state supreme courts may rely on state constitutional law, common law, and/or state statutes, their analysis is driven by the need to protect the free flow of information guaranteed by the First Amendment.

that a constitutionally based privilege exists.[9] Of the twenty-one states that have not enacted a shield law, thirteen of them[10] have the benefit of a recognition by the highest state court that a either a common law or constitutionally based balancing test was required before compelling journalists to disclose unpublished information.[11]

Texas, therefore, is the only state in which (1) there is no shield law by statute, and (2) the highest civil and criminal courts in the state have refused to apply a balancing test between the asserted need for confidential information and the harm on the free flow of information that would result if a

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[9] Ala. Code § 12-21-142 (1986); Alaska Stat. §§ 09.25.300 to -.360 (1992); Ariz. Rev. Stat. Ann. §§ 12-2214, 12-2237, 12-2237 (1993); Ark. Code. Ann. § 16-85-510 (1987); Cal. Evid. Code § 1070 (1993), Colo. Rev. Stat. §§ 13-90-119 & 24-72.5-101 to -105 (1993); Del. Code. tit. 10, §§ 4320-4326 (1992); "Free Flow of Information Act 1992," D.C. Code Ann. §§ 16-4701 to 16-4704 (1992); Ga. Code. Ann. § 24-9-30 (1993); Ind. Code. Ann. § 34-3-5-1 (1992); Ky. Rev. Stat. Ann. § 421.100 (1990); La. Rev. Stat. Ann. §§ 45:1451-59 (1992); Md. Code Ann. Cts. & Jud. Proc., § 9-112 (1992); Mich. Comp. Laws § 767.5a (1982 & 1991 Cum. Supp.); Minn. Stat. Ann. §§ 595.021 to -.025 (1992); Mont. Code Ann. §§ 26-1-901 to -903 (1992); Neb. Rev. Stat. §§ 20-144 to -47 (1992); Nev. Rev. Stat. § 49.275 (1986); N.J. Stat. Ann. §§ 2A:84A-21,-21.1 to -21.8,-21a, -29 (1992); N. Mex. Stat. Ann. § 38-6-7 (1978 & Supp. 1987); N.Y. Civ. Rights § 79-h (1993); N.D. Cent. Code § 31-01006.2 (1991); Ohio Rev. Code Ann. §§ 2739.04 & 2739.12 (1981 & 1990 Supp.); Okla. Stat. Ann. tit. 12, § 2506 (1980 & 1991 Supp.); Ore. Rev. Stat. §§ 44.510-.540 (1989); 42 Pa. Const. Stat. § 5942 (1993); R.I. Gen. Laws §§ 9-19.1-1 to -3 (1985); S.C. Code § 19-11-100 (1993); Tenn. Code Ann. § 24-1-208 (1980 & 1990 Supp.).

[10] Florida, Idaho, Iowa, Kansas, Maine, Massachusetts, New Hampshire, South Dakota, Vermont, Virginia, Washington, West Virginia, and Wisconsin. See citations on page 25-26 of this Petition.

[11] The seven states other than Texas that have neither a shield law nor a pronouncement by the highest state court that a balancing test is required before a reporter will be compelled to disclose unpublished information are Connecticut, Hawaii, Mississippi, Missouri, North Carolina, Utah, and Wyoming.

journalist were forced to disclose confidential information.[12] Such a dramatic difference between the interpretation of First Amendment newsgathering protections in Texas and the protections afforded journalists in sister states, particularly where reporting of the activities of public officials is at issue, compels review by this court by writ of certiorari.

CONCLUSION

The orders signed by the trial court and the opinion of the Texas Court of Appeals risk severely restricting the free flow of information between journalists and their potential sources, the consequence of which will be to restrict the free flow of information to the public at large about their elected officials. In a civil case involving a public official candidate seeking even higher elective office, a journalist must be entitled to protection against compelled disclosure of a confidential source that was not used as the basis for any statement in his publication. The rights of the journalist against compelled disclosure in such a circumstance should be paramount under any balancing test. Although this case involves core First Amendment speech, the Texas trial court and court of appeals did not follow the law established by the federal courts of appeals and of sister states. The result is that the constitutional protections afforded newsgathering activity for reporters in Texas state courts are more restrictive than in federal courts, including federal courts in Texas, and are more restrictive than in any other state in the country. For these reasons,

---

[12] Contrary to the holding of the Texas Court of Appeals, the absence of a codification of a journalist's privilege by the Texas legislature cannot in any way weaken constitutionally based protection of a journalist's rights.

this case merits this Court's full consideration of the specific federal question presented.

Respectfully submitted,

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*Counsel of record for Petitioner

February 2, 1996

[SEAL] THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

November 9, 1995

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500 Dallas, Suite 2600
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Mr. Robert E. Lapin
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One Allen Center
500 Dallas, Suite 2600
Houston, TX 77002-4708

RE: Case Number 95-0869
Style: WAYNE DOLCEFINO
v.
THE HONORABLE ELIZABETH E. RAY, JUDGE

Dear Counsel:

Today, the Supreme Court of Texas overruled relator's motion for rehearing of motion for leave to file petition for writ of mandamus in the above referenced case.

Respectfully yours,

JOHN T. ADAMS, CLERK

By: /s/ MICHAEL C. MURPHEY
Michael C. Murphey, Deputy Clerk

cc: Honorable Elizabeth Ray

[SEAL] THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

October 12, 1995

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RE: Case Number 95-0869
Style: WAYNE DOLCEFINO
v.
THE HONORABLE ELIZABETH E. RAY, JUDGE

Dear Counsel:

Today, the Supreme Court of Texas overruled relator's motion for leave to file petition for writ of mandamus in the above styled case.

Sincerely,

JOHN T. ADAMS, CLERK

By: /s/ COURTLAND CROCKER
Courtland Crocker
Deputy

cc: Honorable Elizabeth Ray

Motion for leave to file petition for writ of mandamus denied and Opinion filed June 15, 1995

[SEAL]

In The

Court of Appeals

For The

First District of Texas

NO. 01-95-00453-CV

WAYNE DOLCEFINO, Relator

V.

THE HONORABLE ELIZABETH RAY, Respondent

Original Proceeding on Motion for Leave to File Petition for Writ of Mandamus

---

OPINION

Relator, a journalist, seeks a writ of mandamus relieving him from the trial court's order to answer questions about information given to him by Mr. Perry. The real party in interest, Sylvester Turner, has sued Dolcefino for slander. Although Mr. Perry gave the information in confidence, Mr. Turner discovered Mr. Perry's identity through his own investigation, without any disclosure by Dolcefino and without

any compulsion by the respondent, Judge Ray. Mr. Perry has already been deposed and has testified about what he did and did not tell Mr. Dolcefino. Mr. Perry is not a journalist, and no one claims he has any privilege. Mr. Dolcefino claims, for himself, a journalist's privilege, based on the first amendment to the United States Constitution and article one, section eight, of the Texas Constitution, to refuse to answer the questions about his conversations with Mr. Perry. We find that Judge Ray did not abuse her discretion and therefore deny leave to file.

Neither the United States Supreme Court nor the Texas Supreme Court has explicitly recognized a journalist's privilege, but some intermediate federal and state appellate courts, including this one, have done so. For example, in *Channel Two Television Company v. Dickerson*, 725 S.W.2d 470, 471 (Tex. App--Houston [1st Dist.] 1987, no writ), a panel of this Court wrote, "The United States Supreme Court has held that a qualified privilege protects information that the press obtains by its investigations. *Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646 (1972)." We find no such holding in *Branzburg*. The only citation in *Channel Two* to *Branzburg* is to the opening page of the opinion. The Fifth Circuit also recognized a first amendment privilege for journalists in *In re Selcraig*, 705 F.2d 789, 792 (5th Cir. 1993), but candidly acknowledged the difficulty of finding support for that position in *Branzburg*, stating, "Our course was dictated by our careful reading of the plurality and concurring opinions in *Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646 (1972)." Again, no particular page of the 20-page *Branzburg* opinion is cited.

The existence of the privilege is apparently gleaned from the fact that the four dissenting justices in *Branzburg* would have granted a privilege even to a reporter called before a

grand jury,[1] while the one concurring judge would not have done so, but suggested there could be such a privilege in some other circumstances.[2] Under this state of the law, we believe that the unqualified statement in *Channel Two* that the United States Supreme Court has created a qualified privilege for journalists is too broad.

Our law of privileges was codified by the Texas Supreme Court on September 1, 1983, in the Rules of Civil Evidence. Although *Branzburg* was decided nine years earlier, the court did not include any privilege for journalists. On the contrary, it declared that no person has a privilege except as provided by the Constitution, statute, or supreme court rules. TEX. R. CIV. EVID. 501. Now, more than seven years after *Channel Two* was decided, the rules still do not provide any privilege for journalists. We express no opinion, however, on the ultimate question of whether such a privilege exists because, under the facts of this case, the trial judge did not abuse her discretion.

It is undisputed that Mr. Perry's identity was discovered by Mr. Turner's own means, without any judicial compulsion. Mr. Perry has no confidentiality left to protect, having already testified about what he did or did not tell Mr. Dolcefino. The reason for having a reporter's privilege is so informants will know that if they speak to the press, courts will not force the press to disclose their identity. Plainly, there is no danger of that here. Moreover, Judge Ray's order and her letter to the parties state that the contents of the meetings and documents produced between Dolcefino and Perry must be revealed "unless the revelation of that information will lead to another confidential source." Judge Ray has provided for that, too, by stating that "[p]rocedural safeguards can be placed to insure that this will not occur."

---

[1] *United States v. Caldwell*, 408 U.S. 711, 92 S.Ct. 2686 (1972) (dissenting opinion by Justice Douglas, in which he indicates his dissent in *Branzburg*); *Branzburg*, 408 U.S. at 710, 92 S.Ct. at 2671 (Stewart, J., dissenting, joined by Justices Brennan and Marshall).

[2] *Branzburg*, 408 U.S. at 710, 92 S.Ct. at 2671 (Powell, J., concurring).

Considering these particular facts, the specific questions Dolcefino has been ordered to answer, and Judge Ray's stated determination to protect Dolcefino from revealing any sources that are still confidential, we conclude that relief is not justified.

Relator's motion for leave to file petition for writ of mandamus is **DENIED**.

It is so **ORDERED**.

PER CURIAM

Panel consists of Justices Cohen, Wilson, and Andell.

Publish. TEX. R. APP. P. 90.

Judgment rendered and opinion filed June 15, 1995.

A true copy attest:

/s/ MARGIE THOMPSON

Margie Thompson
Clerk of Court

[SEAL]

In The

Court of Appeals

For The

First District of Texas

NO. 01-95-00453-CV

WAYNE DOLCEFINO, Relator

V.

THE HONORABLE ELIZABETH RAY, Respondent

Original Proceeding on Motion for Leave to File Petition for Writ of Mandamus

---

AMENDED ORDER

Relator's "Motion For Rehearing Of Motion To File Petition For Writ Of Mandamus And Suggestion Of En Banc Consideration" is **DENIED**.

It is so **ORDERED.**

EN BANC

Chief Justice Oliver-Parrott and Justices Cohen, Hutson-Dunn, Mirabal, Wilson, Hedges, Andell, and Taft voted to deny the motion. Justice O'Connor voted to grant the motion.

Do not publish. TEX. R. APP. P. 90.

Order issued AUG 24 1995
True Copy Attest:

/s/ MARGIE THOMPSON

Margie Thompson
Clerk of Court

NO. 92-32914

SYLVESTER TURNER VS WAYNE DOLCEFINO, KTRK TELEVISION, INC., AND CAPITAL CITIES/ ABC, INC.	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS 165TH JUDICIAL DISTRICT

ORDER CONDITIONALLY GRANTING PLAINTIFF'S MOTION TO COMPEL DEFENDANT WAYNE DOLCEFINO TO TESTIFY CONCERNING PEARY PERRY

Came on to be heard Plaintiff's Motion to Compel Defendant Wayne Dolcefino to Testify Concerning Peary Perry ("Plaintiff's motion") and the court, after consideration of the parties' evidence, briefs and arguments, is of the opinion that said motion should be *conditionally granted.*

The court is mindful of the Constitutional protection afforded to the press to seek out the news while being shielded from disclosure of confidential sources, and the requirement to consider each case on an ad hoc basis as set out in *Dallas Morning News v. Garcia,* 822 S.W.2d 675 (Tex. App.-San Antonio 1991, no writ). The court is also mindful of the competing interests of the Open Courts Doctrine of the Texas Constitution and the Texas Rules of Civil Procedure, which sets forth the rights of a party to obtain relevant discovery.

The Court hereby finds as follows:

1. Plaintiff's motion is limited. Turner does not seek to compel Dolcefino to reveal the identity of "the confidential source" identified by Dolcefino as one of his sources for the December 1, 1991 broadcast;

instead, Plaintiff's motion seeks to compel Dolcefino to answer questions relating to his contacts with a single, identifiable person; namely, Peary Perry who has knowledge of relevant facts.

2. Dolcefino has already testified that he did in fact meet Perry sometime in the several days before the December 1, 1991 broadcast. Dolcefino, however, refuses to answer questions about the nature of the contact or information imparted, claiming a "qualified journalist's privilege."

3. Plaintiff alleges that the Defendant's December 1, 1991 10:00 p.m. broadcast includes statements about the identity of Channel 13's source for the Foster story. Plaintiff's cause of action challenges the veracity of those statements.

4. Defendant's December 5, 1991 broadcast which, on its face, seeks to identify the "real source" of the Foster story, opens the door for discovery by Plaintiff to challenge the veracity of that statement. Defendant's conduct as embodied by its December 5 broadcast is discoverable requiring Plaintiff's claim of actual malice.

5. Perry has repeatedly testified that he has "no recollection" of imparting confidential information to Dolcefino about the Foster matter and accordingly, has "no recollection" of requesting that Dolcefino maintain his anonymity in connection with that subject matter. Accordingly, the court finds that Dolcefino testimony is Plaintiff's only method of proof concerning Perry's involvement in this controversy.

6. The Court further finds Defendant's claim of privilege is insupportable because the alleged source is no longer "confidential." Indeed, it was through Plaintiff's efforts as required by *Dallas Morning*

News that Perry was identified as a probable source. Accordingly, common sense dictates that the contents of the meetings and/or documents produced by that source cannot be held subject to the privilege unless the revelation of that information will lead to another confidential source.

7. After balancing all factors unique to this matter, the court rules that Plaintiff has met the requirements of both Texas and federal common law sufficient at least to overcome any claim of journalist's privilege with respect to the interrogation of Dolcefino about the nature and extent of all contacts he had with Peary Perry before December 1, 1991.

To that end, the Court is desirous of imposing some procedural limitations to ensure that the "journalist's privilege," to the extent that it may apply, is carefully protected.

It is, therefore

ORDERED, ADJUDGED AND DECREED as follows:

1. Defendant Wayne Dolcefino shall appear for the continuation of his deposition in the 165th Judicial District Court on March 27th, 1995, at 9:00 a.m., to be presided over by the Court, to answer questions propounded to him by Plaintiff's counsel attached hereto as Exhibit A, concerning his pre-December 1, 1991 broadcast contacts with Peary Perry.

2. If, in response to any of the questions, Dolcefino asserts the "journalist's privilege," all present except Dolcefino, his counsel, the court reporter and judge shall be excused. Dolcefino shall then be directed to answer those questions *in camera,* under oath and on the record.

If Dolcefino answers the questions and the court determines that certain of the questions are appropriate under the principles governing assertion of the "journalist's privilege," the court shall so rule and the *in camera* proceeding shall end. Once all parties and counsel have returned to open court, those of Dolcefino's answers which the court has ruled are not privileged, shall be read to Plaintiff's counsel, unless Dolcefino advises the court of his intent to immediately seek appellate review of the court's ruling. If the court is so advised, the order overruling the objections on the basis of privilege will be stayed while Mr. Dolcefino seeks appellate review of such order so long as appellate review (by mandamus or otherwise) is sought not later than 30 days after the court's ruling. The stay shall remain in effect until all appeals (including mandamus) are exhausted or Mr. Dolcefino advises the court that no further appellate review is sought. The *in camera* record will be sealed pending the outcome of the appeal.

If Dolcefino answers the questions and the court determines that any questions invade privileged matters, the *in camera* record will be sealed and Plaintiff's counsel will not be permitted to know Dolcefino's answer to the question.

If Dolcefino refuses to answer the questions in accordance with the above procedure, the court shall rule in open court, and if appropriate, will direct Dolcefino to answer. If he refuses, and advises the court of his intent to immediately seek appellate review of the court's ruling, the rulings will be stayed while Mr. Dolcefino seeks appellate review of such order so long as appellate review (by mandamus or otherwise) is sought not later than 30 days after the court's ruling. The stay shall

remain in effect until all appeals (including mandamus) are exhausted or Mr. Dolcefino advises the court that no further appellate review is sought.

3. The court will determine when this deposition shall be concluded.

Furthermore, the Court hereby incorporates its letter opinion dated November 9, 1994, and attaches a copy of the same hereto as an expression of the basis for its findings and order entered today.

SIGNED and ENTERED this 27 day of March, 1995.

ELIZABETH RAY
JUDGE PRESIDING

EXHIBIT "A"

QUESTIONS TO BE PROPOUNDED TO WAYNE DOLCIFINO

Definitions

With regard to the following questions, any reference to the "Foster matter" is meant those general facts and circumstances relating to the alleged accidental death of Sylvester C. Foster on or about June 22, 1986, his will and probate related thereto, and any involvement by Sylvester Turner in that matter or controversy.

Questions:

1. At any time before 10:00 p.m. December 1, 1991, did Shara Fryer suggest or indicate to you in any manner that Peary Perry may be a source of information about the "Foster matter"?
2. If so, when did she communicate that to you, in what form, and what specifically did she say or communicate?
3. At any time before 10:00 p.m. December 1, 1991, did Clyde Wilson suggest or indicate to you in any manner that Peary Perry may be a source of information about the "Foster matter"?
4. If so, when did he communicate that to you, in what form, and what specifically did he say or communicate?
5. What contacts or communications, if any, did you have with Peary Perry on or during Wednesday, November 27 through 10:00 p.m. December 1, 1991?
6. With respect to each contact or communication, if any, that you had with Perry, state:
    a) the date, time, place and method of the contact or communication,

b) who initiated the contact or communication,

c) the length of time of the contact or communication, and

d) the specific subject matter of the contact or communication.

7. At any time before 10:00 p.m. December 1, 1991, did Peary Perry impart to you any information relating in whole, or in part, to the "Foster matter"?

   If so, what specific information, and when did he impart it to you?

8. At any time before 10:00 p.m. December 1, 1991, did Peary Perry provide you with any documents or written material of any nature relating in whole, or in part, to the "Foster matter"?

   If so, describe the specific documents, explain when he provided them to you, and describe specifically what information they contained.

9. At any time before 10:00 p.m. December 1, 1991, to your knowledge or belief, did Peary Perry deliver or cause to be delivered to you or Channel 13 any documents from the Foster probate files? If so, specifically describe the documents?

10. At any time before 10:00 p.m. December 1, 1991, did Peary Perry advise you that he was attempting to obtain certain probate documents from the "Foster matter"?

    If so, did Perry advise you who or what persons were obtaining the selected probate documents?

11. At any time before 10:00 p.m. December 1, 1991, did Peary Perry provide you with the names of any other persons whom he believed could provide information about the "Foster matter"?

12. If so, please list the names of any such persons whom you do not consider to be a confidential source.

    If you do consider such a person as a confidential source, please so designate the person as such, and explain under what circumstances the source sought confidentiality.

13. Did you learn at any time before 10:00 p.m. December 1, 1991 that Peary Perry was in any manner affiliated with the mayoral campaign of Bob Lanier?

    If so, what did you learn, and how did you obtain that information?

14. During any meetings, communications, or contacts with Perry that you may have had before 10:00 p.m. December 1, 1991, did you learn or inquire of him if he was affiliated with the mayoral campaign of Bob Lanier?

    If so, what did he tell you about his affiliation or role in the Lanier campaign?

NO. 92-32914

SYLVESTER TURNER,	IN THE DISTRICT COURT
Plaintiff,	
VS.	HARRIS COUNTY, TEXAS
WAYNE DOLCEFINO, KTRK TELEVISION, INC., CC TEXAS HOLDING CO., INC. AND CAPITAL CITIES/ABC, INC.,	
Defendants.	165TH JUDICIAL DISTRICT

ORDER

On the 27th day of March, 1995 the Court convened a hearing in the above-referenced case pursuant to the Court's Order conditionally granting Plaintiff's Motion to Compel Wayne Dolcefino to testity concerning Perry Peary. Mr. Dolcefino was present in Court and represented by counsel. The questions to be propounded to Mr. Dolcefino are attached as Exhibit "A" to the Court's March 27 Order. Mr. Dolcefino responded to questions one, two, three, four, five, thirteen and fourteen.

Mr. Dolcefino asserted a claim of journalistic privilege with respect to questions six, seven, eight, nine, ten, eleven and twelve. The Court convened in *in camera* proceeding and, based upon the findings numbered 1-7 in the Court's March 27, 1995 Order, which are incorporated herein, makes the following rulings following receipt of Mr. Dolcefino's testimony in the *in camera* proceeding.

1. With respect to question no. six Mr. Dolcefino's claim of journalistic privilege is overruled.

2. With respect to question no. seven Mr. Dolcefino's claim of journalistic privilege is overruled.

3. With respect to question no. eight Mr. Dolcefino's claim of journalistic privilege is overruled.

4. With respect to question no. nine Mr. Dolcefino's claim of journalistic privilege is overruled.

5. With respect to question no. ten Mr. Dolcefino's claim of journalistic privilege is overruled.

6. With respect to question no. eleven Mr. Dolcefino's claim of journalistic privilege is overruled.

7. With respect to question no. twelve Mr. Dolcefino's claim of journalistic privilege is overruled.

IT IS SO ORDERED.

SIGNED this 18 day of April, 1995 at Houston, Texas.

ELIZABETH RAY
DISTRICT JUDGE

APPROVED AS TO FORM:

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NO. 92-32914

SYLVESTER TURNER Plaintiff, VS WAYNE DOLCEFINO, KTRK TELEVISION, INC., CC TEXAS HOLDING CO., INC. AND CAPITAL CITIES/ABC, INC., Defendants.	IN THE DISTRICT COURT HARRIS COUNTY, TEXAS 165TH JUDICIAL DISTRICT

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO COMPEL DEFENDANT WAYNE DOLCEFINO TO TESTIFY CONCERNING PEARY PERRY

. . .

III.

DOLCEFINO IS ENTITLED TO A JOURNALIST'S QUALIFIED PRIVILEGE

In *Branzburg v. Hayes,* 408 U.S. 665 (1972) the United States Supreme Court recognized that the news gathering process is entitled to constitutional protection. Since the *Branzburg* decision, courts have recognized that the use of confidential sources is an integral part of the news gathering process and that the compelled disclosure of confidential sources would have a chilling effect on the free flow of information. *See Mize v. McGraw-Hall, Inc.,* 82 F.R.D. 475 (1979), *reh'g denied,* 86 F.R.D. 1 (1980); *Miller v. TransAmerican Press, Inc.,* 621 F.2d 721, 725 (5th Cir.), *modified on reh'g,* 628 F.2d 932 (5th Cir. 1980), *cert. denied,* 450 U.S. 1041 (1981); *Zerilli v. Smith,* 656 F.2d 705, 711 (D.D.C. 1981).

The qualified privilege against compelled disclosure of a confidential source or confidential information possessed by a journalist is not only grounded in the First Amendment to the United States Constitution but also in Article 1, § 8 of the Texas Constitution. *See Dallas Morning News v. Garcia,* 822 S.W.2d 675, 678 (Tex. App. — San Antonio 1991, no writ); *Channel 2 Television Co. v. Dickerson,* 725 S.W.2d 470, 472 (Tex. App. — Houston [1st Dist.] 1987, no writ).

Contrary to Plaintiff's bald statement that Dolcefino cannot claim a journalist's privilege for a witness who has already been identified, the privilege belongs to the journalist, rather than the source, and it can be waived only by the journalist. *See U.S. v. Cuthbertston,* 630 F.2d 139, 147 (3d Cir. 1980), *cert. denied,* 449 U.S. 1126 (1981); *Palandjian v. Pahlavi,* 103 F.R.D. 410 (D.D.C. 1984). Thus, even if Peary Perry is Dolcefino's confidential source, as alleged by Plaintiff,[1] the fact that Plaintiff has otherwise identified him does not waive any rights of Dolcefino to refuse to divulge information that would tend to reveal the identity of his confidential source. Nor does the fact that plaintiff has the burden of proving actual malice in this libel case compel disclosure of a confidential source. In fact, the Fifth Circuit has held that the "First Amendment interest in granting a privilege is particularly strong when the article concerns a public figure." *Miller,* 621 F.2d at 726. Rather, courts confronted with the issue facing this Court have attempted to strike a balance between the First Amendment protections afforded the news gathering process, including protecting the confidentiality of news sources, and the interests of a litigant in a civil suit attempting to prove his case. *See, e.g., Miller,* 621 F.2d at 725-26; *Bruno & Stillman, Inc. v. Globe Newspaper Co.,* 633 F.2d 583 (1st Cir. 1980); *Mize v. McGraw-Hill,* 82 F.R.D. at 476; *Garcia,* 822 S.W.2d at 678-79.

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[1] By filing this Response, Dolcefino is not in any way endorsing Plaintiff's allegation that Peary Perry is the confidential source.

The *Garcia* court was the first and only Texas court to directly address the constitutional protections afforded a journalist in refusing to reveal the identity of confidential sources in a public figure libel case. In a very thorough opinion, the *Garcia* court held:

> In the ordinary case the civil litigant's interest in disclosure should yield to the journalist's privilege. Indeed, if the privilege does not prevail in all but the most exceptional cases, its value will be substantially diminished. Unless potential sources are confident that compelled disclosure is unlikely, they will be reluctant to disclose any confidential information to reporters.

Garcia, 822 S.W.2d at 681 quoting *Zerilli v. Smith,* 656 F.2d at 712. The burden of overcoming the journalist's privilege is on the party seeking discovery and that party must produce *substantial evidence* demonstrating:

1) that the statement attributed to the informant was published and is false and defamatory;

2) that reasonable efforts have been made to learn the informant's identity by alternative means, but that no other reasonable means is available; and

3) that knowledge of the informant's identity is necessary or critical to proper preparation and presentation of the case.

Garcia, 822 S.W.2d at 680 (citing *In re Selcraig,* 705 F.2d 789, 792 (5th Cir. 1983) and *Miller v. TransAmerican Press,* 628 F.2d at 932). Plaintiff does not contest the fact that Dolcefino is a journalist, that he is employed by KTRK, that he was acting in his journalistic capacity when he met with his confidential source, and that he promised confidentiality to the source and the source met with him with the understanding that his/her identity would remain confidential. Consequently, the burden is on Plaintiff to present substantial evidence necessary to overcome the journalist's privilege.

. . .

The evidence in this case so far shows a complete lack of any proof of actual malice. Under such circumstances, the intrusion upon the First Amendment and Article I, Section 8 of the Texas Constitution that would be represented by requiring a journalist to reveal his confidential source is not justified. The reason that Dolcefino is resisting disclosure of the identity of his confidential source is not to "conceal perjury," as alleged by Plaintiff, but rather to insure the continued vitality of the news gathering process, a process that depends upon the use of confidential sources.

. . .